

No.
(Capital Case)

In the Supreme Court of the United States

MARION ALEXANDER LINDSEY,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

**PETITION FOR A WRIT OF CERTIORARI
AND APPENDIX VOLUME I**

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**CAPITAL CASE
QUESTIONS PRESENTED**

1. Whether courts evaluating ineffective-assistance-of-counsel claims may evaluate only each error in isolation—or whether they are obligated to consider the prejudice resulting from the cumulative effect of counsel’s deficiencies.

2. Whether a trial court’s wholesale adoption in a capital case of the State’s proposed order without providing any judicial guidance or substantive change violates the Due Process Clause or Eighth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Marion Alexander Lindsey, the applicant in the state trial court, and respondent State of South Carolina.

RELATED PROCEEDINGS

Criminal proceeding and direct appeal:

State of South Carolina v. Lindsey, No. 02-GS-42-0453 (Ct. Gen. Sessions, Spartanburg Cnty.) (May 21, 2004, convicted) (May 24, 2004, sentenced to death)

State v. Lindsey, No. 26268 (S.C.) (Feb. 20, 2007, affirming) (Apr. 4, 2007, denying rehearing)

Lindsey v. South Carolina, No. 07-5444 (U.S.) (Oct. 1, 2007, denying certiorari)

State post-conviction proceeding:

Lindsey v. State, No. 07-CP-42-2848 (Ct. Common Pleas, Spartanburg Cnty.) (Aug. 12, 2011, order denying post-conviction relief) (Oct. 2, 2015, amended order denying post-conviction relief)

Lindsey v. State, No. 2012-206087 (S.C.) (Sept. 30, 2014, vacating first post-conviction relief order and remanding).

Lindsey v. State, No. 2015-000385 (S.C.) (Apr. 9, 2015, denying petition for extraordinary relief)

Lindsey v. State, No. 2016-000404 (S.C.) (Mar. 25, 2016, denying renewed petition for extraordinary relief).

Lindsey v. State, No. 2019-001271 (S.C.) (Nov. 5, 2025, affirming denial of post-conviction relief)

Federal post-conviction proceeding:

Lindsey v. Anderson, No. 25-mc-903 (D.S.C.) (Feb. 10, 2026, staying execution until May 11, 2026)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marion Lindsey respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 924 S.E.2d 104 and is reproduced in the appendix at 1a-119a. The decisions of the state trial court are unreported and reproduced in the appendix at 120a-338a and 339a-389a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on November 5, 2025. On January 27, 2026, the Chief Justice extended the time to file a petition for certiorari to April 3, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.

The Eighth Amendment to the U.S. Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT

South Carolina intends to put petitioner Marion Lindsey to death. But his trial counsel spent insufficient time preparing for his penalty trial, yielding a haphazard presentation of mitigation evidence that, as it turned out, omitted much of the salient material that could have convinced a jury to spare petitioner's life. What is more, when petitioner sought post-conviction relief for ineffective assistance of counsel, the *State*, for all practical purposes, authored the order denying that claim: the trial court initially signed without apparently reading it, typos and all.

This petition thus presents two important and recurring issues whose convergence here produced a stunning breakdown in judicial process with life and death consequences. The first question is whether courts evaluating ineffective-assistance-of-counsel claims must consider prejudice based on the cumulative effect of counsel's errors—or whether a court may dissect each error and consider prejudice in isolation. The second question is whether a trial court's wholesale adoption in a capital case of the State's proposed order without providing any judicial guidance or substantive change violates the Due Process Clause or Eighth Amendment.

Petitioner shot and killed his estranged wife in a public parking lot and then attempted to kill himself. The State sought the death penalty based on a single aggravating factor—that the act risked death to more than one person in a public place by means of a dangerous weapon. Against this, petitioner has amassed substantial mitigating evidence, including of his compromised mental state at the time of the shooting and of his extreme childhood poverty, abuse, and trauma.

His defense counsel, however, did not start preparing for the penalty phase of petitioner's trial until a month before and, as a result, presented only a half-baked mitigation case.

Petitioner sought state post-conviction relief, in part on the ground that his counsel rendered ineffective assistance in presenting his mitigation case. The evidentiary hearing featured testimony from ten mitigating witnesses who did not testify at trial and additional testimony from five witnesses who did. These witnesses presented significant new details unknown to the sentencing jury regarding petitioner's childhood, including the repeated and severe violence he experienced and witnessed; the severity of petitioner's depression and neuropsychological deficits; petitioner's severe emotional and distressed state of mind before and after the crime; and his ability to adapt to life in prison.

Petitioner had a materially different mitigation case than the one his trial counsel prepared. But the state court denied post-conviction relief by signing—*without even reading*—the State's proposed order. The order was riddled with errors, including upward of 155 typos. After the state supreme court vacated that order and remanded, the post-conviction court adopted the same order again. This time, it corrected typographical errors petitioner had identified, made minor formatting adjustments, initialed each page, and called the state supreme court to "prove" the judge had read it. It changed no substance—only editing a single turn of phrase.

The South Carolina Supreme Court affirmed both the state court's re-adoption of the State's proposed order and denial of relief for ineffective assistance. In

both respects, the court diverged from decisions of other courts, yielding a deeply troubling result: a man may be executed without a jury ever hearing, nor a state court judge considering, petitioner's substantial mitigating circumstances.

First, the state supreme court's approval of the trial court's uncritical re-adoption of the State's proposed order simply because the court promised to have now read it and fixed typos is irreconcilable with that of the Eleventh Circuit on remand in *Jefferson*, which found fundamental unfairness in materially similar circumstances.

Second, a three-justice majority rejected petitioner's ineffective-assistance claim for lack of prejudice. The majority assessed, item-by-item, whether there was a reasonable probability of a different result and concluded that no individual item met that threshold. But it never analyzed the cumulative effect of all the omitted testimony nor balanced that mitigating evidence with the single aggravating factor.

Understanding this Court's legal framework quite differently, two justices dissented. They emphasized the "importan[ce]"—particularly here—of "focus[ing] on weighing the mitigating evidence against the aggravating." App., *infra*, 64a. In a lengthy table, the dissent "summariz[ed] the enormous amount of mitigation evidence revealed at the [post-conviction relief] hearing and comparing it to the skeleton of facts heard by the jury at the sentencing trial." *Id.* at 67a-119a. Under that analysis, the dissent explained, "there is a reasonable probability that one juror would have chosen life after hearing [petitioner's] full story." *Id.* at 66a.

The disagreement between the majority and dissent reflects broader conflict among lower courts. Multiple federal circuits have recognized that courts must assess the cumulative effect of counsel's deficiencies to determine prejudice. And some courts have expressly held as much when a court assumes deficiency and then evaluates prejudice.

Two circuits, by contrast, have rejected that framework and refuse to assess the prejudice of assumed deficiencies cumulatively. This distinction can make all the difference in an ineffective-assistance claim. "Although a specific error, standing alone, may be insufficient to undermine the court's confidence in the outcome, multiple errors together may" well. *Hough v. Anderson*, 272 F.3d 878, 891 n.3 (7th Cir. 2001).

This case presents a compelling opportunity to resolve these recurring questions that have divided the lower courts. That resolution is imperative given the irretrievably severe consequences for petitioner. The Court should review both questions presented.

A. Petitioner's penalty-phase trial

A jury convicted petitioner of murdering his estranged wife. S.C. App. 1718-1719. The State pursued the death penalty based only on a single statutory aggravating factor—that the act occurred in a public place with a weapon that could harm others. S.C. Code § 16-3-20(C)(a)(3) (2002).

Petitioner's counsel prepared little for the penalty phase. Although two years elapsed between petitioner's arrest and trial, counsel did not start investigating death-sentence mitigation evidence until a month before trial. App., *infra*, 39a. During those

weeks, counsel hired only two professionals—a psychiatrist, who had little to no experience with capital cases (S.C. App. 2883), and an investigator, who had no experience with mitigation cases (*id.* at 2405).

The investigator spent only fifty hours before trial scrambling to track down available records and locate witnesses. S.C. App. 2429-2431, 2944-2945. She did not have time to fully engage with witnesses nor to track leads on potential witnesses—like a family doctor who knew petitioner personally. *Id.* at 2396-2400. Given the serious time crunch, she could only follow counsel’s direction as to where to look because she had “no time” to perform her role “normally” nor “to argue with [counsel] about what they needed to do.” *Id.* at 2429. Indeed, she was still attempting to collect records *during* trial. *Id.* at 2403-2404, 2951-2952. And counsel never asked her to obtain—and she did not receive releases until mid-trial for—family members’ medical records for mental health services. *Id.* at 2404, 2439, 2951-2952.

The forensic psychiatrist, Dr. Margaret Melikian, had difficulty obtaining medical records from counsel, received incomplete records, did not have sufficient time to review all the records, and only had time to see petitioner once, for a total of 2.5 hours. S.C. App. 2882, 2893-2893, 2900, 2908. Counsel sent her unattended into a teleconference with the trial judge to explain why she needed more time to prepare (*id.* at 2893-2894), but counsel never requested nor received a continuance (*id.* at 2893, 3622; S.C. 2d Supp. App. 181). And counsel spent only 30 minutes the night before preparing Dr. Melikian to testify (S.C. App. 2900).

Counsel also failed to retain a social-work expert, or any other expert, to present a holistic “bio-

psychosocial assessment” of petitioner. S.C. App. 2770-2774. Nor did counsel hire an expert to testify about whether petitioner could adapt to prison to counter the state’s expert’s assertion that he was incapable of adapting to life in prison. App., *infra*, 46a.

Counsel also performed defectively during the sentencing trial itself. He failed to prepare and even prevented some witnesses from asking the jury for mercy (S.C. App. 2728), even though, under South Carolina law, witnesses in capital cases “who know and care for” the defendant may “ask for mercy on his behalf.” *State v. Torrence*, 406 S.E.3d 315, 318 (S.C. 1991). He failed to preserve key evidence, including a tape recording from petitioner to his prior counsel an hour before the shooting of his estranged wife and himself, which reflected his “distressed, very distraught,” and “emotional[]” state (*id.* at 2453, 2358), nor to present testimony from a responding paramedic who would have testified to petitioner’s suicidal state immediately after the shooting (*id.* at 2383).

After the penalty phase of trial, the jury recommended a death sentence. App., *infra*, 14a.

B. Post-conviction proceedings below

The South Carolina Supreme Court affirmed petitioner’s conviction and death sentence on direct review. *State v. Lindsey*, 642 S.E.2d 557 (S.C. 2007), *cert. denied*, 552 U.S. 917 (2007). Petitioner then sought post-conviction relief in state court. App., *infra*, 14a.

1. Post-conviction relief hearing

At his post-conviction hearing, with the assistance of new counsel, petitioner presented a mitigation picture far different “in nature and degree” from what

the sentencing jury heard. App., *infra*, 52a-53a (Hill, J., dissenting). The evidentiary hearing included testimony from ten mitigating witnesses who did not testify at trial and additional testimony from five witnesses who did.

Among the many significant revelations from fact witnesses:

- Petitioner’s mother testified to additional details about his childhood, including that he was physically abused by her live-in boyfriend and sustained not-before-mentioned head injuries. App., *infra*, 16a-17a, 53a-55a, 67a-71a.
- Petitioner’s brother testified for the first time that he spoke to petitioner shortly before the shooting, and he was “messed up” and “all out of his mind.” App., *infra*, 19a, 81a-87a.
- Petitioner’s former attorney testified for the first time that petitioner left him a voicemail about an hour before the murder, in which he sounded “emotional, distressed, and distraught.” App., *infra*, 19a-20a, 55a-56a.
- The paramedic who responded to the murder scene testified, also for the first time, that petitioner shot himself in the head and wanted the paramedics to let him die. App., *infra*, 22a, 94a-95a.
- Several witnesses who knew petitioner also testified about their desire to ask the jury for mercy for him. App., *infra*, 12a, 21a, 43a-44a, 74a.

The post-conviction hearing also featured substantial new testimony from experts, including Dr. Brawley, who performed an “extended clinical

interview and battery of neuropsychological tests” on petitioner, and Jan Vogelsang, who “conducted a biopsychosocial assessment on Lindsey and his family.” App., *infra*, 22a-25a. This testimony presented petitioner’s childhood—as one of extreme violence and “constant threat of harm”—in a way largely unknown to the sentencing jury. S.C. App. 2808. Among many important details that emerged, during his childhood petitioner witnessed his mother shoot at her boyfriend and members of his family fight one another, hit their girlfriends, and even burn his cat alive. *Ibid.* And multiple family members attempted suicide. App., *infra*, 18a.

Dr. Melikian also testified that she now had “six to seven times more records and information” than she did during her trial testimony, and this additional information “would have changed” her diagnosis of petitioner. App., *infra*, 25a-26a.

A prison-adaptability expert finally presented evidence that could have rebutted the State’s expert. James Aiken reviewed the record and concluded that, despite what the jury heard, the South Carolina Department of Corrections could manage Lindsey “without causing unreasonable risk of harm” to others. S.C. App. 2491.

2. *The post-conviction court’s uncritical adoption of the State’s proposed order*

Months after the post-conviction hearing, the court requested that the State submit a proposed order. App., *infra*, 121a; Pet. App. 393a; S.C. Supp. App. 1. It did not ask defense counsel for a proposed order at the same time. App., *infra*, 121a.

The post-conviction court then signed the State's 192-page order. Other than striking through the month on the signature page (S.C. App. 3727), the court did not make a single change. App., *infra*, 28a.

The order was riddled with objective errors that could only reflect that the trial court failed to read the order. The order referred to itself throughout as a "pleading" rather than an "order." See, *e.g.*, Pet. App. 417a. And petitioner catalogued 155 errors that were in the State's proposed order that the trial court retained in the final order. *Id.* at 613a-630a. This included typos and misspellings and errors in punctuation, subject-verb agreement, citations, grammar, and capitalization. *Ibid.* On just one page, for example, the order included a sentence fragment, tense agreement errors, and the word "shit" instead of "shift." *Id.* at 566a-567a; S.C. App. 3688.

3. *The South Carolina Supreme Court's vacatur and remand*

Petitioner sought relief from the South Carolina Supreme Court. In light of the "frequency and severity of the drafting errors" and prior "admonishments to [post-conviction relief] judges" criticizing wholesale adoption of a party's proposed order, the court vacated the post-conviction order and remanded for the trial court to issue "an amended order." Pet. App. 390a-391a.

4. *The post-conviction court's re-adoption of the same proposed order*

On remand, the trial court asked the parties to send Microsoft Word versions of the same proposed orders. S.C. 2d Supp. App. 17. Petitioner promptly sought a new post-conviction relief hearing before a

new judge (*id.* at 7-13), but the state supreme court denied that request without explanation (*id.* at 89).

The PCR court then entered an “amended order” that re-adopted the State’s original order. App., *infra*, 120a-338a. The order did not include any substantive changes—no new factual findings or new legal conclusions. Instead, the court made minor stylistic and typographical corrections by:

- Correcting the objective errors petitioner catalogued to the state supreme court;
- Italicizing instead of underlining case names;
- Decreasing the point size of footnotes;
- Altering outline formats from bullet points or roman numerals to letters;
- Bolding some headings and un-bolding others; and
- Altering spacing in headings.

It also corrected some typographical errors petitioner had not catalogued—but left others. Compare, *e.g.*, App., *infra*, 249a, with Pet. App. 522a (“not an expert in mental health area”).

The most significant revision the court made was to change a turn of phrase. The original order provided: “Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest *at prior counsel’s feet* as current counsel now speculate.” Pet. App. 460a. The amended order revised the text: “Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest *on prior counsel’s shoulders*.” App., *infra*, 187a.

The trial judge then initialed each page of the amended order and “made three handwritten and initialed edits to typographical errors in the amended order.” App., *infra*, 29a.

Petitioner moved for a new post-conviction hearing and a new judge. The trial judge admitted he read the proposed orders “probably too hastily” the first time. App., *infra*, 349a. But he asserted that the “State’s order ‘was exactly as [the court] * * * saw the case that was presented.’” *Ibid.* And the judge revealed that he had instructed his law clerk to “purposely” “leave some errors in there so [he] could initial them to prove” his involvement in the amended order, and he called the state supreme court to tell them he had read it. *Id.* at 29a-30a.

The court denied petitioner’s motion for a new trial or recusal. It *again* signed the State’s proposed order, initialing each page (App., *infra*, 339a-389a) but making no changes—and maintaining 59 typographical errors (Pet. App. 631a-635a).

5. *The South Carolina Supreme Court’s affirmance*

The South Carolina Supreme Court affirmed the denial of post-conviction relief, with two justices dissenting. App., *infra*, 1a-119a.

a. The court approved the trial court’s procedure for the amended order over petitioner’s due process and Eighth Amendment challenges (see S.C. Pet. Br. 6-27). App., *infra*, 32a-36a. The court concluded that the judge had “sufficiently reviewed the State’s proposed order before issuing the amended [] order.” *Id.* at 34a. It based that on the fact that the judge stated (1) that the State’s order “was exactly as [he]” “saw

the case”; (2) that one “would never imagine the number of hours” the court spent working on the case; and (3) that he “purposefully left in errors so [he] could fix and initial the errors to prove [he] read the order.” *Id.* at 34a-35a. The court accordingly presumed the correctness of the trial court’s factual findings and found the procedure was not a “violation of [petitioner’s] constitutional rights.” *Id.* at 35a.

b. The court affirmed rejection of petitioner’s claim that counsel rendered ineffective assistance during the penalty phase. App., *infra*, 36a-47a.

The majority separated petitioner’s ineffective-assistance claim into individual errors, assumed expressly or implicitly that each was deficient, and held that each deficiency had not prejudiced petitioner. App., *infra*, 36a-47a.

It “first address[ed] Dr. Melikian’s testimony.” App., *infra*, 40a-41a. Despite Dr. Melikian testifying that she would have had a materially different understanding of petitioner’s circumstances had she had greater access to petitioner, to records, to information, and to family members, the court concluded petitioner was not prejudiced. It reasoned that Dr. Melikian offered the same bottom-line opinions at the sentencing trial that she did during the post-conviction relief hearing. Compare *id.* at 40a-41a, with *id.* at 56a-57a, 97a-103a (distilling Melikian’s testimony differences).

Second, it concluded that petitioner was not prejudiced by trial counsel’s ineffective communication of the mitigation case. App., *infra*, 42a-43a. It reasoned that the witnesses who testified during the penalty phase introduced relevant facts about petitioner, including that he was suicidal, depressed, run over as a

baby, had an absent father, and had mental health issues. *Ibid.*

Third, the court “reject[ed] th[e] claim” regarding counsel’s lack of preparation and prevention of mitigation witnesses from asking the jury to show mercy on the ground that petitioner’s mother, father, and close friend had the opportunity to ask for mercy. App., *infra*, 43a-44a. According to the court, several additional witnesses asking for mercy—which would have included petitioner’s childhood friend and respected business leader Bill Burton; Mr. Burton’s mother, Patsy Burton; petitioner’s uncle Steven Pilgrim; aunt Bessie Smith; and younger brother Timothy Sims—would have been “cumulative,” citing harmless-error review precedent, and thus could not have caused prejudice for *Strickland* purposes. *Ibid.*

Fourth, regarding counsel’s failure to call the EMS worker that petitioner asked to let him die, the court concluded that the jury could have inferred petitioner wanted to die, and, according to the court, the EMS worker would have “contradicted” petitioner’s “claims” that the murder resulted because the victim was “fooling around” on him rather than “not letting him visit his sons.” App., *infra*, 44a.

Finally, the court found that, even though trial counsel performed deficiently by failing to call a prison-adaptability expert, this error standing alone had not prejudiced petitioner because petitioner’s adaptability expert would have had to admit on cross-examination that petitioner has engaged in violence. App., *infra*, 44a-45a.

At no point did the court analyze the collective weight of counsel’s errors in building petitioner’s mitigation case as compared to the sole aggravator—of

the murder occurring in a public place with a weapon. See App., *infra*, 39a-47a.

Justice Hill, joined by Justice Beatty, dissented as to petitioner’s ineffective-assistance claim. App., *infra*, 49a-66a. In their view, “[a] closer look at the new mitigation evidence shows that it was much different in nature and degree than what the sentencing jury heard.” App., *infra*, 52a-53a. The dissent included a lengthy appendix (*id.* at 67a-119a), “summarizing the enormous amount of mitigation evidence revealed at the PCR hearing and comparing it to the skeleton of facts heard by the jury at the sentencing trial” (*id.* at 55a).

The dissent found “important” this Court’s decision in *Thornell v. Jones*, 602 U.S. 154 (2024), which “focus[ed] on weighing the mitigating evidence against the aggravating,” particularly because “there was only one aggravator here.” App., *infra*, 64a-65a. And, as the dissent observed, there was substantial additional mitigating evidence. *Id.* at 52a-61a. The post-conviction relief testimony of Rod Tullis, Jan Vogelsang, and Dr. Brawley—who did not testify at all at trial—and Dr. Melikian—who testified at trial but provided additional testimony at the post-conviction relief hearing after actually having adequate time to review records—was particularly significant: “Tullis had the best contemporaneous evidence about Lindsey’s state of mind at the time of the murder” (*id.* at 56a); “Vogelsang’s testimony pulled together the threads of Lindsey’s life to provide the jury a complete narrative” (*id.* at 58a); Dr. Brawley “related that Lindsey’s mental tracking, verbal fluency, naming ability, and verbal learning ability were all ‘severely impaired’” (*ibid.*); and, compared to her trial testimony,

Dr. Melikian’s testimony of how petitioner’s major depressive disorder “affected [his] cognitive ability changed utterly” (*id.* at 56a).

In all, in the dissent’s view, “[t]he mitigation evidence at the sentencing trial was sterile and bland.” App., *infra*, 62a. And although viewing petitioner’s crime as “both cruel and reckless,” “there is a reasonable probability that one juror would have chosen life after hearing his full story.” *Id.* at 66a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the two independently important questions in this case.

I. REVIEW IS WARRANTED TO RESOLVE WHETHER PREJUDICE FROM INEFFECTIVE ASSISTANCE IS ASSESSED CUMULATIVELY.

This case presents a question that has produced persistent disagreement in the lower courts: whether courts must evaluate prejudice in the ineffective-assistance analysis by considering the cumulative effect of counsel’s errors.

A defendant raising ineffective assistance of counsel must make two showings: (1) “deficient performance”—that counsel’s efforts “fell below an objective standard of reasonableness”—and (2) “prejudice”—a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984).

While *Strickland* permits courts to assume that “counsel’s performance was deficient” and proceed straight to the prejudice prong (466 U.S. at 670), a court cannot reject the claim where a claimant has shown a “reasonable probability” of a different

outcome but for the alleged errors. *Id.* Courts, however, have diverged over whether they must assess the prejudicial effect of all actual or assumed errors cumulatively.

In the decision below, the court evaluated each conceded deficiency’s prejudicial effect in isolation, never evaluating whether their combined effect undermined confidence in the outcome. That approach is incompatible with *Strickland* and its progeny, including *Thornell*. This case presents a clean opportunity for the Court to resolve the issue and confirm that courts must assess prejudice in light of the totality of counsel’s errors, not in artificially isolated fragments.

A. Courts are divided on whether to aggregate counsel’s errors in assessing prejudice.

Courts and scholars¹ have long recognized—and continue to recognize—disagreement and confusion over whether to aggregate counsel’s errors when assessing prejudice. Indeed, courts are squarely split over whether to aggregate counsel’s errors for purposes of the prejudice analysis when, like here, the court assumes deficiencies in performance.

a. The **First Circuit** has “long held that the prejudice inquiry under *Strickland* can be a cumulative one as to the effect of all of counsel’s slipups that

¹ See, e.g., Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1651 (2020); Ruth A. Moyer, *To Err Is Human, to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 DRAKE L. REV. 447, 452 (2013); J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The “Ethical” Issue of Issue Selection*, 80 DENV. U. L. REV. 155, 188 (2002).

satisfy the deficient-performance prong.” *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021). Where a lawyer raised a meritless theory, failed to challenge a damaging photo, failed to contest certain agent testimony, and failed to call favorable witnesses, the court rejected the government’s effort to “attack[] each *item by item*” and instead affirmed a “conclusion that the defects *as a group*” produced the requisite prejudice. *Id.* at 39-40.

The **Second Circuit** holds similarly. In *Lindstadt v. Keane*, the court counted “four errors made by Lindstadt’s defense counsel that can be said to fall outside the ‘wide range of professionally competent assistance,’” and “consider[ing] these errors in the aggregate,” it reversed rejection of an ineffective-assistance claim. 239 F.3d 191, 199 (2d Cir. 2001).

The **Seventh Circuit**, in *Washington v. Smith*, took the same approach and affirmed a finding of ineffective assistance. 219 F.3d 620, 634-635 (7th Cir. 2000). When “[e]valuated individually, these errors may or may not have been prejudicial to Washington, but we must assess ‘the totality of the omitted evidence’ under *Strickland* rather than the individual errors.” *Ibid.*

When *assuming* deficient performance for certain errors, the **Ninth Circuit** has made express that each assumed error must be evaluated collectively to assess prejudice: “[E]ven assuming that Bejarano’s trial counsel at times performed deficiently, we conclude that the ‘cumulative effect’ of any errors did not prejudice Bejarano.” *Bejarano v. Reubart*, 136 F.4th 873, 899 (9th Cir. 2025).

The **Iowa Supreme Court** has made this conclusion express too. In *State v. Clay*, 824 N.W.2d 488 (Iowa 2012), the court explained that, when a defendant raises multiple errors as ineffective assistance, if the court chooses to analyze the prejudice prong without considering whether the errors rose to the level of deficient performance, “the court can only dismiss the postconviction claim if the alleged errors, cumulatively, do not amount to *Strickland* prejudice.” *Id.* at 501-502.

b. Three circuits—and now the South Carolina Supreme Court—have declined to aggregate deficiencies in assessing *Strickland* prejudice.

The **Eighth Circuit** applies a rule that “a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test.” *Hall v. Leubers*, 296 F.3d 685, 692-693 (8th Cir. 2002); see also *Middleton v. Roper*, 455 F.3d 838 (8th Cir. 2006) (applying this rule); *Marcrum v. Luebbbers*, 509 F.3d 489 (8th Cir. 2007) (same).

The **Fourth Circuit** has held that *Strickland* claims proceed individually at the prejudice stage. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (“To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now.”); *Mueller v. Angelone*, 181 F.3d 557, 586 n.22 (4th Cir. 1999) (holding that *Fisher* “foreclose[s]” “consider[ing] the *cumulative* effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation”).

The **Sixth Circuit** did the same in *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) (“Because Campbell has not shown that any of the alleged instances of ineffective assistance of counsel deprived him ‘of a fair trial, a trial whose result is reliable’ * * * he cannot show that the accumulation of these non-errors warrant relief.”).

The Sixth and Eighth Circuits have specifically adhered to this rule even when *assuming* deficient performance for certain errors.

The Sixth Circuit in *Campbell* observed that it need not assess counsel’s errors cumulatively. The court invoked *Strickland*’s language that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice * * * that course should be followed.” *Campbell*, 364 F.3d at 730 (quoting *Strickland*, 466 U.S. at 697). And the Court then made individualized prejudice findings. See *id.* at 731 (holding failure to make a Speedy Trial Act claim, individually, not prejudicial); *id.* at 732 (holding failure to move for a downward departure, individually, not prejudicial); *id.* at 733 (holding failure to object to a witness’s reference to organized crime, individually, not prejudicial); *id.* at 733 (holding inappropriate remarks made to the jury, individually, not prejudicial); *id.* at 733 (holding failure to propose a certain jury instruction, individually, not prejudicial). Over the defendant’s request, the court refused to analyze the claims “based upon the cumulative effect of all alleged errors.” *Id.* at 736.

The Eighth Circuit used the same approach in *Pryor v. Norris*, 103 F.3d 710 (8th Cir. 1997). The court bypassed *Strickland*’s performance prong, concluding that it “need not reach the performance prong

if we determine that the defendant suffered no prejudice from the alleged ineffectiveness.” *Id.* at 713. But it analyzed the prejudice from multiple alleged errors on an individual, error-by-error basis. *Id.* at 713-714. And it refused to consider prejudice cumulatively, despite the defendant’s “argu[ment] that the cumulative effect of her trial counsel’s alleged errors resulted in prejudice.” *Id.* at 714 n.6 (quoting *Girtman v. Lockhart*, 942 F.2d 468, 475 (8th Cir. 1991)).

South Carolina had long expressed confusion, believing the law “unsettled” as to “whether individual errors, which may not [have] be[en] independently prejudicial,” can be found “prejudicial when taken as a whole.” *Green v. State*, 569 S.E.2d 318, 325 (S.C. 2002); *Lorenzen v. State*, 657 S.E.2d 771, 779 n.3 (S.C. 2008) (describing the question as “unsettled”), *abrogated on other grounds by Smalls v. State*, 810 S.E.2d 836 (S.C. 2018). In the decision below, however, the court aligned with the Fourth, Sixth, and Eighth Circuits’ approach by assessing prejudice for assumed deficiencies individually and failing to analyze the combined effect of all counsel’s errors on the overall presentation of petitioner’s mitigation case. App., *infra*, 36a-47a. It took each error item-by-item, “first address[ing] Dr. Melikian’s testimony,” then Dr. Vogel-sang’s, and each individual fact witness’s. It followed that with a discussion of the failure to ask for mercy, to present testimony from the EMS worker, and failing to obtain prison adaptability evidence. *Ibid.* It did not analyze the collective weight of these omissions. *Ibid.*

B. This case presents a suitable opportunity to resolve this important question.

The Court should take this opportunity to resolve this important and open question that it previously left unresolved.

1. The Court previously granted certiorari to address the question but ultimately did not resolve it. See Pet. Br. i, *Banks v. Dretke*, 540 U.S. 668 (2004), No. 02-8286; *Banks*, 540 U.S. at 689 n.10. The second question presented in *Banks* was whether the court of appeals “act[ed] contrary to *Strickland v. Washington*, 466 U.S. 668 (1984) and *Williams v. Taylor*, 529 U.S. 362 (2000)” by “weigh[ing] each item of mitigating evidence separately and conclud[ing] that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively.” Pet. Br. i, *Banks*, 540 U.S. 668.

Although the Court ultimately reversed on an unrelated *Brady* issue, the court of appeals’ error there is materially indistinguishable from the one here: the court found or assumed several penalty-phase errors were deficient performance but refused to aggregate the errors in assessing prejudice (*Banks v. Cockrell*, 48 F. App’x 104, *18 (5th Cir. 2002)), instead assessing each error’s prejudicial effect individually. See *id.* at *18-19 (addressing inadequately preparing defendant’s parents to testify), *id.* at *17-18 (addressing “psychological information”); *id.* at *18-19 (addressing failure to interview witnesses). At no point did the court of appeals evaluate whether the result of the proceeding might have been different had the defendant’s trial counsel not made *all* errors. Given that several courts continue to use the same mode of analysis

(see *supra* at 19-21), resolution at this juncture is imperative.

2. Courts' continued divide over the analytical framework (see *supra* at 17-21)—a disarray the decision below perpetuates—confirms the need for the Court to address this frequently recurring question.

The existing split produces divergent outcomes in similar circumstances. While one defendant may have all the deficiencies in his counsel's performance assessed collectively, another may have each rejected as not prejudicial individually. Compare, *e.g.*, *Baptiste*, 8 F.4th at 39-40, with *Campbell*, 364 F.3d at 736. This inevitably produces disparate outcomes—potentially often. An estimated 80 percent of capital federal habeas cases and 50 percent of non-capital federal habeas cases involve an ineffective-assistance-of-counsel claim. Nancy J. King, Fred L. Cheesman & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 28 (Aug. 21, 2007), perma.cc/MU8K-6UZC.

3. Answering this question now—on review of a state supreme court decision—also avoids the complication of federal habeas proceedings. The simple fact that federal courts *perceive* a circuit split can create substantial difficulty for vindicating federal rights. Because defendants seeking habeas relief must prove a violation of “clearly established federal law” under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §§ 2254(d)(1)-(2), the existence of case law and scholarship observing a circuit split influences lower courts to deny relief even where they agree with the defendant.

The district court in *Chester v. Vannoy*, 2018 WL 2970912 (E.D. La. 2018), for example, highlighted this problem. Though it agreed with the habeas petitioner that a state court erred by “fail[ing] to consider the combined prejudicial effect of each of trial counsel’s deficiencies” (see *id.* at *51-52), it hesitated to hold the rule clearly established, citing an article on the split. *Id.* (citing Moyer, *supra*).

Although, for the reasons explained below, the rule in fact is clear and clearly established (*infra* at 24), the restrictive lens of AEDPA deference may complicate review. The Court should take this opportunity now, arising out of state court, to ensure vindication of Sixth Amendment rights.

C. The decision below is wrong.

Prejudice from counsel’s inadequate performance at a capital sentencing trial arises when “there is a reasonable probability that, absent [counsel’s] errors, the sentencer * * * would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Thornell*, 602 U.S. at 163 (quoting *Strickland*, 466 U.S. at 695). This test is inherently cumulative: it asks whether the outcome of petitioner’s sentencing trial might have been different if all of counsel’s errors—plural—had not occurred. *Id.*

This Court has repeatedly endorsed cumulative-prejudice analysis in the decades since *Strickland*. It has instructed courts, in assessing prejudice, not to focus on an isolated error but “the totality of the available mitigation evidence.” *Williams*, 529 U.S. at 397. A “prejudice determination” must “evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in

aggravation.” *Id.* at 397-398; see also *Thornell*, 602 U.S. at 171-172 (*Strickland* prejudice analysis in capital sentencing “requires an evaluation of the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.”); *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (a court must weigh “the entire body of mitigating evidence * * * against the entire body of aggravating evidence”).

2. The court below failed to assess the effect of counsel’s deficient performance cumulatively. It did not consider the totality of the mitigation evidence, including its quality and quantity, that a competently performing lawyer would have presented in comparison to the single aggravating factor. Indeed, the majority did not even mention *Thornell*—this Court’s most recent case reminding lower courts to balance all the aggravating and mitigating evidence cumulatively—despite the dissent’s extensive focus on it. Compare App., *infra*, 1a-48a, with *id.* at 49a-66a.

That is, even though the state supreme court assumed that petitioner’s trial counsel performed deficiently in several ways—by failing to adequately investigate and present several different pieces of mitigation evidence, by presenting the evidence ineffectively, by failing to call a prison-adaptability expert, and by instructing witnesses not to ask for mercy—the court assessed these errors in total isolation to conclude these many presumptive errors had not prejudiced petitioner’s mitigation case. See App., *infra*, 39a-47a.

At no point did the court endeavor to “evaluate the totality of the available mitigation evidence” that a competently performing lawyer would have introduced at petitioner’s penalty trial. *Williams*, 529 U.S.

at 397. It did not link the evidence nor assess how this evidence, collectively, would have transformed the incoherent mitigation case petitioner’s counsel prepared into the powerful one counsel could have put forward had he devoted appropriate time and preparation to it. At most, the court provided a single conclusory sentence in the “conclusion” section stating there was no prejudice. App., *infra*, 47a. But the substance of the opinion comprises only separate holdings that each instance of counsel’s deficient performance, considered in isolation, did not prejudice petitioner’s defense. A rote recitation of the legal standard at the end cannot cure the utter absence of an “analysis” of “the strength of all the evidence and a comparison of the weight of aggravating and mitigating factors.” *Thornell*, 602 U.S. at 171-172.

3. Had the South Carolina Supreme Court appropriately considered the evidence cumulatively, it would have had to find prejudice on the combined force of counsel’s errors. The dissent illustrates as much. After “add[ing] the new mitigating evidence to the pan,” petitioner’s “sentencing profile’ bears little resemblance to the [petitioner] the jury saw.” App., *infra*, 64a-65a.

Petitioner’s mother provided substantially more detail about petitioner’s childhood—painting a picture that was “different and decidedly bleaker.” App., *infra*, 53a. Other witnesses would have left similarly stronger impressions: “Tullis had the best contemporaneous evidence about Lindsey’s state of mind at the time of the murder” (*id.* at 56a); “Vogelsang’s testimony pulled together the threads of Lindsey’s life to provide the jury a complete narrative” (*id.* at 58a); Dr. Brawley “related that Lindsey’s mental tracking,

verbal fluency, naming ability, and verbal learning ability were all ‘severely impaired’” (*ibid.*); and, compared to her trial testimony, Dr. Melikian’s testimony of how petitioner’s major depressive disorder “affected [his] cognitive ability changed utterly” (*id.* at 56a).

In all, “there is a reasonable probability that one juror would have chosen life after hearing [petitioner’s] full story.” App., *infra*, 66a.

II. REVIEW IS WARRANTED TO SETTLE THE EXTENT TO WHICH COURTS MAY UNCRITICALLY ADOPT A STATE’S PROPOSED ORDER.

A. The decision below diverges from the Eleventh Circuit.

Although this Court has stated that “uncritically accepted findings” of facts prepared by a party remain “those of the court” under the federal rules of civil procedure (*Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985)), it has also “criticized that practice” (*Jefferson v. Upton*, 560 U.S. 284, 294 (2010) (per curiam)).

In *Jefferson*, the Court acknowledged that it has not fully “considered the lawfulness of ... the use of such a practice” where, for example, a court “adopts findings that contain internal evidence suggesting that the judge may not have read them.” 560 U.S. at 294. The Court thus remanded a capital habeas proceeding for lower courts to assess whether, when the state court adopts a state’s proposed order verbatim, “the state court’s factual findings warrant[ed] a presumption of correctness” under the pre-AEDPA habeas statute. *Ibid.*

1. The decision below squarely diverges from the remand decision in *Jefferson*.

The **Eleventh Circuit** in proceedings on remand in *Jefferson* affirmed the district court's conclusion that the "state habeas court had not afforded [the petitioner] a full, fair, and adequate hearing consistent with due process, and, thus, that the state habeas court's findings were not entitled to a presumption of correctness." *Jefferson v. GDCP Warden*, 941 F.3d 452, 471, 474-477 (11th Cir. 2019).² In reaching that conclusion, the court found "[n]otabl[e]" several factors: that the trial judge "did not provide a preliminary memorandum outlining his essential findings of fact or conclusions of law," did not "state anything in open court about how he viewed the case," "did not provide any guidance * * * about how the proposed order was to be drafted or what was to be included," did not inform the defendant he had requested the proposed order or accept a competing proposed order, and "other than altering the concluding sentence and including the date and his signature, [the judge] made no changes to the proposed order, notwithstanding the many glaring errors it contained." *Id.* at 475. More, after this happened, deferential review by a state appellate court "did not remove the taint of procedural irregularity." *Id.* at 476. "Taking all of this together," that record "compels the conclusion that [the defendant] did not receive a full and fair hearing." *Id.*

The **South Carolina** Supreme Court, by contrast, held that the trial judge's uncritical adoption of the State's proposed order was "not in violation of

² Although construing the pre-AEDPA federal habeas statute, one of the triggered provisions included whether "the applicant was otherwise denied due process of law in the State court proceeding." *Jefferson*, 941 F.3d at 473 n.6 (citing 28 U.S.C. § 2254(d)(7) (1966)).

[petitioner’s] constitutional rights.” App., *infra*, 35a. According to that court, due process is satisfied so long as (1) a defendant is aware of the request for a proposed order and can submit one and (2) the trial court “carefully reviews” the proposed order the second time around after having signed it previously. *Id.* at 34a.

This reasoning is irreconcilable with the Eleventh Circuit’s decision in *Jefferson*. The state trial court engaged in nearly every action of which the Eleventh Circuit had disapproved: It did not provide a preliminary memorandum outlining his essential findings of fact, did not state anything in open court about how he viewed the case (at least not until pressed to defend his amended order), did not provide any guidance about how the proposed order was to be drafted, and—in the initial order—merely altered the date and affixed his signature, notwithstanding the many glaring errors. See *Jefferson*, 941 F.3d at 474-477.

2. More broadly, courts since *Jefferson* have taken vastly differing approaches to trial court orders that uncritically adopt one party’s proposed order, particularly in capital cases.

The **Ohio** Supreme Court has recognized post-*Jefferson* that a trial judge adopting a party’s proposed findings with errors and reflecting a lack of “independent and thorough review” is an “obvious mistake” and implicates “the essence of due process.” *State v. Riley*, 253 N.E.3d 92, 97-98 (Ohio 2024). The court thus vacated findings that included a substantive error and “at least one typographical error that was in the State’s proposed findings.” *Ibid.*

The **Mississippi** Supreme Court has also rejected the practice in similar circumstances in capital cases.

In *Chase v. State*, after concluding that the trial judge merely signed the state’s 57-page proposed order, “raising concerns in this death-penalty case,” it ordered the trial court to “issue his *own* Findings of Fact and Conclusions of Law.” 112 So. 3d 421, 422 (Miss. 2013) (emphasis added).

The **Fourth Circuit** has similarly insisted that courts must “look to the facts of each case” before concluding that a court properly refrained from the uncritical adoption of a proposed order post-*Jefferson*. *Burr v. Jackson*, 19 F.4th 395, 405 (4th Cir. 2021).³ Although it has not “la[id] down any blanket perimeters,” *Burr* found adequate a court’s adoption of a state’s proposed order only because the trial judge had evidently “reconsidered” an initial uncritical adoption and “made both major and minor changes throughout, including adding substantial sections of text.” *Id.* at 406-407.

Other courts, however, “have not altered their deferential standards of review * * * including after *Jefferson*.” *Burr*, 19 F.4th at 405. The **Fifth Circuit**, for

³ This resembles a longstanding approach in several federal courts of appeal to apply heightened review to uncritically adopted findings. *E.g.*, *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 60 n.2 (D.C. Cir. 1982) (“examin[ing] the decision with special care in light of [appellant’s] point that the findings were not initially penned by the district judge”); *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 409 (5th Cir. 2001) (“the district court’s decision to adopt one party’s proposed findings and conclusions without change may cause us to approach such findings with greater caution”); *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985) (“[W]hen a district court adopts a party’s proposed findings of fact, ‘we examine the findings especially critically when deciding whether they are clearly erroneous.’”) (citation omitted).

example, denied relief in a case where a state court requested the state's proposed order and signed it verbatim, notwithstanding *Jefferson*. The court reasoned that this Court has "never found" verbatim adoption "to violate due process," and it "[d]id not read the Court's statement that it had 'not considered the lawfulness' * * * to be an invitation to grant habeas relief." *Green v. Thaler*, 699 F.3d 404, 416 (5th Cir. 2012).

B. This question is of utmost importance.

As a starting point, it is hard to overstate the importance of ensuring the process that produces capital punishment satisfies basic fundamental fairness. "[D]eath as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). Given this reality, "there is a corresponding * * * need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); see also, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) ("Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction.").

Courts have been especially wary of lower courts' uncritical adoption in capital cases, "where the need for an adversarial process and a neutral arbiter is at its zenith." *Burr*, 19 F.4th at 407; see also, e.g., *Chase*, 112 So. 3d at 422 (uncritical adoption "rais[es] concerns in this death-penalty case"); *State v. Smith*, 863 P.2d 1000, 1012 (Mont. 1993) ("[D]ispleasure with a district court's verbatim adoption of proposed findings * * * is especially true when the district court is

statutorily charged with weighing aggravating and mitigating factors in a matter so grave as the imposition of the death penalty.”).

Review is especially important considering AEDPA’s constraints on federal habeas review. See 28 U.S.C. §§ 2254(d)-(e). In light of AEDPA, federal courts are largely confined to the state-court record and must generally defer to state-court adjudications. As a result, if a state court fails to provide a constitutionally compliant procedure, but nonetheless claims the outcome of its unconstitutional procedure deserves deference under AEDPA, the opportunity to ensure federal oversight is restricted. This Court’s review is essential to ensure that state courts understand and satisfy minimum constitutional requirements in the first instance.

C. The decision below is wrong.

Fundamental constitutional protections—in the Due Process Clause and Eighth Amendment—compel the conclusion that uncritically adopted fact findings require a remedy, through reassignment, retrial, or de novo appellate review.

1. The Due Process Clause “imposes procedural limitations on a State’s power to take away protected entitlements.” *District Attorney’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009). Although “due process does not ‘dictat[e] the exact form’” of proceedings for a State that “chooses to offer” postconviction relief procedures, the State’s offered process cannot offend “fundamental” “principles of justice” or “transgress[] any recognized principle of fundamental fairness in operation.” *Id.* at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

The very essence of due process is the right to a fair and impartial tribunal and a meaningful opportunity to be heard. “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955); see also *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”). And “[t]he core of due process is the right to notice and a meaningful opportunity to be heard.” *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

Where a “procedure” provides a “possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused,” it “denies the latter due process of law.” *Murchison*, 349 U.S. at 136 (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)). After all, “justice must satisfy the appearance of justice.” *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); see also *Marshall*, 446 U.S. at 242 (“Th[e] requirement of neutrality in adjudicative proceedings * * * preserves both the appearance and reality of fairness.”).

“Due process” accordingly “entitles” a defendant “to ‘a proceeding in which he may present his case with assurance’ that no member of the court is ‘pre-disposed to find against him.’” *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016) (quoting *Marshall*, 446 U.S. at 242). This Court has long enforced this basic requirement of due process where a judge risks appearance of bias. *Murchison*, 349 U.S. at 136-137 (judge could not serve as both grand jury and trial judge); *Williams*, 579 U.S. at 16 (judge could not have participated in major decision as a prosecutor). Accord *Offutt*, 348 U.S. at 17 (judge could not adjudicate

criminal contempt after becoming “personally embroiled” in an “intermittently continuous wrangle” with defense counsel).

A trial court’s uncritical adoption of factual findings drafted by an opposing party violates these fundamental tenets. Adopting an opposing party’s findings of fact wholesale “does not give the parties the appearance of careful, detached judicial conduct” (*Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 314-315 (7th Cir. 1986)) and “may cause the losing party to believe that his position has not been given the consideration it deserves” (*Berger v. Iron Workers Reinforced Rodmen Loc. 201*, 843 F.2d 1395, 1404 (D.C. Cir. 1988)).

This Court has accordingly long criticized lower courts’ uncritical adoption of a party’s proposed order. See, e.g., *Jefferson*, 560 U.S. at 294 (“[W]e have also criticized that practice.”); *Anderson*, 470 U.S. at 570 (“We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties.”); *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n.13 (1974) (“In adopting, verbatim, proposed findings of fact * * * the District Court failed to heed this Court’s admonition voiced a decade ago”). Lower courts, likewise, have extensively criticized the practice.⁴

⁴ E.g., *Allied Chem. Int’l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 481 (2d Cir. 1985); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1215 (3d Cir. 1993); *Aiken Cnty. v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 677 (4th Cir. 1989); *McLennan*, 245 F.3d at 409; *Mactec, Inc. v. Bechtel Jacobs Co.*, 346 F. App’x 59, 70 (6th Cir. 2009); *Walton*, 786 F.2d at 313-314; *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999); *L.K. Comstock & Co. v.*

On remand in *Jefferson*, the Eleventh Circuit delineated several factors material to whether the defendant had received a full, fair, and adequate hearing consistent with due process. *Jefferson*, 941 F.3d at 474-477. This case displays nearly every single factor: the trial judge “did not provide a preliminary memorandum outlining his essential findings of fact or conclusions of law,” did not “state anything in open court about how he viewed the case” before signing the state’s proposed order, “did not provide any guidance * * * about how the proposed order was to be drafted or what was to be included,” and—in the initial order—“other than altering the concluding sentence and including the date and his signature, [the judge] made no changes to the proposed order, notwithstanding the many glaring errors it contained.” *Id.* at 475. Compare *supra* at 9-11.

The state trial court, merely by re-adopting the exact same order without any substantive change and making only cosmetic changes to “prove” to the state supreme court he read it the second time around, did not cleanse this “taint of procedural irregularity.” *Jefferson*, 941 F.3d at 476. Once again, the court never provided a preliminary memorandum outlining his essential findings, did not state in open court how he viewed the case before signing it, did not provide guidance other than to give him the same order he’d already signed, made no substantive changes—and continued to include substantive errors. See App., *infra*,

United Eng’rs & Constructors Inc., 880 F.2d 219, 222 (9th Cir. 1989); *Flying J Inc. v. Comdata Network, Inc.*, 405 F.3d 821, 829-830 (10th Cir. 2005); *Lykes Bros., Inc. v. U.S. Army Corps of Eng’rs*, 64 F.3d 630, 634 n.4 (11th Cir. 1995); *Berger*, 843 F.2d at 1404.

195a (misattributing Chris Wilkins’s testimony to Bill Burton). This conduct only confirms that on remand petitioner entered a “proceeding in which” the court was “predisposed to find against him.” *Williams*, 579 U.S. at 16.

2. The Eighth Amendment “requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). And there is magnified “need for reliability in the determination that death is the appropriate punishment in a specific case.” *Ibid.*

Here, petitioner’s underlying claim is that counsel rendered constitutionally ineffective assistance in presenting his mitigating circumstances during the penalty phase of a capital trial. In response, the post-conviction relief court uncritically adopted the State’s proposed order and, when admonished, re-adopted the same order correcting certain typos and formatting and with a series of steps to show that he had finally actually read it. All combined, such a procedure surely cannot provide “reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson*, 428 U.S. at 305.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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